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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-266
Rate Regulation	)	

To: The Commission

REPLY COMMENTS
OF NEWHOUSE BROADCASTING CORPORATION
IN RESPONSE TO THE FIFTH NOTICE OF PROPOSED RULEMAKING

I. Introduction

The comments in response to the Fifth Notice recognize that the terms and conditions under which cable operators are able to introduce and offer a la carte service options are inseparable from the "going forward" issue. Congress specifically encouraged cable operators to unbundle their service tiers to give subscribers more choice, and therefore, Newhouse urges the Commission to tread lightly when implementing any new limits relevant to a la carte offerings of previously tiered cable channels.

On September 1, 1993, after lengthy study and consideration, including discussions with Commission staff members, of the Commission's two-prong test for permissible a la carte, Newhouse instituted two separate a la carte offerings in many of its cable systems.

While there were variations in the number and makeup of the a la carte channel groupings, the first generally included three satellite superstations removed from the basic tier and, occasionally, one additional satellite cable network removed from the second most popular cable programming service tier. The second a la carte grouping encompassed all the channels that had been offered on a distinct third service tier which had been affirmatively marketed to all subscribers, but was not required to be purchased to obtain any other per channel or per program offering. This second subscriber option contained from 4-9 cable networks that had given Newhouse express permission to offer them a la carte. Despite heavy marketing and other subscriber incentives, the level of subscribers taking the third tier was quite low, typically ranging from one-fourth to one-half of all subscribers.

In addition, both prior to and subsequent to the September 1, 1993 restructuring, the company's overall rates have been well under the industry average. Its rates for regulated services in virtually every instance were less than the permissible April 1993 benchmarks, and the price for the a la carte channels converted from the third tier was the same or less than the prior tier rate.

Yet, despite its long history of reasonable rates and the good faith effort to comply with the April 1, 1993 a la carte standards, Newhouse notes that some commenters have recommended artificially meager and arbitrary limits on the number of channels which could be removed from tiers on September 1, 1993 for a la carte offerings. Indeed, there have been reports that certain operators and programmers, as part of an overall "going-forward" consensus, have reached a loose agreement on such a limit on such migration for purposes of establishing a "safe harbor" for permissible a la carte unbundling. While Newhouse believes

that recent efforts of the Commission to find such consensus are understandable, and acknowledges that cable operators' need for regulatory certainty has reached emergency levels, no level of urgency can justify the imposition of arbitrary limits on the unbundling on September 1, 1993 of previous tier channels to a la carte.

II. The Commission Must Clarify the Rules Governing the Shifting of Channels to A La Carte

The Commission must refrain from any approach that would establish as a standard for lawful a la carte offerings any limitation on the number of channels that could be offered on an a la carte basis as of September 1, 1993, which had previously only been available on a previously offered tier. The Commission should neither make a distinction between "old" (i.e., previously tiered) and "new" channels for a la carte purposes, nor should it establish a ceiling on the number of channels that can be moved to a la carte status.

A. The Number of Channels Moved to A La Carte Has No Bearing on Whether it is a Regulated Tier

Newhouse asserts that no rational basis exists that justifies distinguishing between "old" and "new" channels for the purposes of determining whether an a la carte collective offering should be treated as a regulated tier. The content and prior history of channels offered on an a la carte basis should play no role in establishing the regulatory status of the channels. The sole test that should be relevant for determining whether collective a la carte channels are subject to regulation should be the two-part test articulated in Section 76.986 of the Commission's rules.[1]

[1] 47 CFR § 76.986.

According to this test, collective a la carte offerings are not deemed part of a regulated tier when (1) the price for the combined package does not exceed the sum of individual charges for each component of service, and (2) the cable operator continues to provide the component parts of the package to subscribers in addition to the collective offering. Newhouse submits that this two-part test effectively preserves consumer choice with respect to a la carte offerings without taking into account the number, content, or prior tier history of the a la carte channels. Specifically, the two-part test preserves subscriber choice by ensuring that subscribers have the freedom to make a la carte purchases while not being effectively forced to purchase an unregulated package in order to obtain a few desired services.

Newhouse further notes that even if the Commission establishes "safe harbor" guidelines, as discussed below, for blessing some collective a la carte offerings, a la carte offerings implemented on September 1, 1993 that fall outside such a "safe harbor" must be governed solely by the two-part standard enunciated in Section 76.986. It is important to note that Section 76.986 is the only express regulatory provision guiding permissible a la carte offerings. That provision, which was adopted as part of the Commission's Second Order on Reconsideration (released March 30, 1994) reiterates only the two-prong test originally mentioned in the text of the Commission's April 1, 1993 Order.

B. The Number of Channels Moved to A La Carte Does Not Form the Basis for a Finding of Regulatory Evasion

The issue of whether a cable operator's a la carte collective offerings constitute an evasion is separate from the issue of whether the services are truly available on an a la carte basis. Newhouse asserts that there is no rational basis for the Commission to base findings

of evasions solely on the number of channels that migrated to a la carte on September 1, 1993. Newhouse, as part of its restructuring in September 1993, chose not to collapse its third tier programming into the much more popular second tier with the resultant automatic lift in penetration. Instead, it increased the options available to subscribers by implementing a la carte on all the third tier channels. It makes little sense for the Commission to deem such a la carte service offered by cable operators "evasions" when the cable operator is simply implementing alternative service offerings available to its subscribers on the same basis from virtually every competing multichannel video distribution service (including nationally delivered TVRO and DBS service). A la carte offerings, both individual and in packages, are necessary if cable operators are to successfully compete against all other competitors who are free to offer services in many combinations, including a la carte.

Newhouse emphasizes that what should be at the core of the evasion issue is addressing actual, bona fide evasions of rate regulation, not merely controlling the number of previous tier channels that can be offered a la carte. Depending on what a cable operator does with its rates when it migrates a channel or channels to a la carte, a one channel migration can be an evasion of rate regulation, while a ten channel migration could be a sincere effort to give subscribers genuine a la carte choices. As such, it makes no sense for the Commission to establish a "safe harbor" based in any direct manner on the number of channels that can be potentially used by a cable operator to evade rate regulation.

C. Channel Limits, If Imposed, Must Relate Only to the Most Popular Tiers of Service

In the event that, with respect to claims of "evasion," the Commission establishes "safe harbor" guidelines limiting channel migration, such limits should not apply to channels

shifted from less popular programming tiers. The concept of evasion is so potentially broad that it should be directed at activities that affect the average cable subscriber. Without such focus, any action in any way affecting any subscriber could be alleged to be an evasion. No business can respond to legitimate marketplace developments under a policy that potentially deems any change in operations an evasion. The "typical cable subscriber" approach used in the Commission's analysis of cable rate reductions issued on July 14, 1994 seems an appropriate measure in this situation. In that analysis, the "typical cable subscriber" was characterized as one who takes only the basic tier and the cable programming service tier with the largest number of channels.[2] As such, rates for other tiers were not considered by the Commission.

The Commission should adopt a similar "typical cable subscriber" approach for any migration limitation. Since the "typical cable subscriber" does not take the third tier of service, migration of such channels should be of no concern in the context of evaluating evasion issues. Migration should especially be of no consequence in instances where the price of the collective offering of a la carte was less than or did not increase from the prior tier rate, and the cable networks carried on the third tier have expressly given their authority to the cable operator to shift their programming to an a la carte basis.

Accordingly, Newhouse urges the Commission, to the extent that it adopts a ceiling on migrated channels as part of "safe harbor" from evasions, to not consider channels removed from any tier other than the basic tier and the most highly penetrated cable

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[2]Report on the Cable Service Bureau's Survey on the Rate Impact of the Federal Communications Commission's Revised Rate Regulations, DA 94-767, ft. 5 (July 14, 1994).

programming service tier, as long as (1) the tier, prior to being offered a la carte, had been affirmatively marketed, (2) the channels were carried with express permission from cable programmers to convert the tier service to a la carte offerings, and (3) the price of obtaining the channels did not increase from the price of its tier offering to its a la carte package price.

D. Encouraging the A La Carte Offering of Less Popular Tiers Supplements the Goal of the Anti-Buy-Through Requirement

As discussed, unbundling less popular tiers to a la carte should raise no implications of regulatory evasion. Indeed, giving operators the flexibility to offer (and subscribers the flexibility to purchase) channels previously available on less popular tiers on an a la carte basis is the perfect complement to the so-called anti-buy-through provision, section 623(b)(8) of the Cable Act, as amended. This provision generally prohibits cable operators from requiring subscribers to purchase any tier of service, other than basic, as a condition of access to video programming offered on a per channel or per program basis.

The FCC in adopting the buy-through regulations to implement the statutory provision, reiterated the stated Congressional purpose:

> [t]he purpose of this provision is to increase options for consumers who do not wish to purchase upper cable tiers but who do wish to subscribe to premium or pay-per-view programming. [G]reater unbundling of offerings leads to more subscriber choice and greater competition among program services. Through unbundling, subscribers have greater assurance that they are choosing only those program services they wish to see and are not paying for programs they do not desire. [footnotes omitted][3]

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[3]Report and Order in MM Docket No. 92-262, 8 FCC Rcd 5631, ¶ 4 (rel. May 3, 1993).

The stated Congressional goal of the anti-buy-through provision is to promote choice and allowing the migration of channels from less popular tiers provides the maximum number of options. As has been demonstrated, most Newhouse subscribers have chosen not to take the third tier of service. They are the typical cable subscriber. While Newhouse subscribers have never been required to take this third tier as a condition of obtaining per channel or per program services, cable operators under the anti-buy-through provision, where technically capable, now must allow subscribers who want per channel offerings to bypass the purchase of any tier above basic. Establishing a migration "safe harbor" that limits the unbundling of channels from less popular tiers, forecloses the perfect complement to this buy-through prohibition. A cable subscriber should have the choice not simply to bypass a tier of services, which as a group may not be attractive, but should also have the option to select individual channels of particular interest without having to reject them all. The cable operator should not be foreclosed by an artificial channel migration limit from providing subscribers this additional option. The operator has no incentive to price tiers with low penetration at a higher level in an a la carte format. When considered as a complement to the anti-buy-through provision, no public policy reason exists to limit the migration of such channels in computing a "safe harbor" for a la carte.

III. There Should Be No Retroactive Liability Prior to the Commission's Clarification of its A La Carte Rules

Finally, there should be no retroactive liability imposed on cable systems for a la carte offerings implemented prior to June 1, 1994, as a result of subsequent Commission clarifications or interpretations. To impose such retroactive liability would be grossly unfair. Newhouse made every good faith effort to comply with Congressional and Commission

intentions as expressed regarding its a la carte offerings of September 1, 1993. Such efforts should not be labelled "evasions" or otherwise punished under a standard articulated after the fact and as to which the cable operator had no knowledge when it established its unbundled service offerings.

For the above-stated reasons, Newhouse believes there is no rational basis for finding that an a la carte package instituted on September 1, 1993 remains a regulated tier or constitutes an evasion based, in large measure, on the number of channels migrated from previously offered tiers. However, if the Commission determines that the level of channel migration should be a factor in establishing a "safe harbor" for a la carte offerings, it must not consider any such channels taken from a tier other than basic or the most highly penetrated cable programming service tier if such channels have previously been affirmatively marketed, were migrated under express contractual rights, and the a la carte package was priced no higher.

Respectfully submitted,

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